ENTERED
Clerk, U.S. District Court
April 8, 1999
Central District of California

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA –
WESTERN DIVISION

YAHYA LAVI,	) Civil No.CV 98-8264-WJR(Mc)
	)
Petitioner,	) JUDGMENT
	)
v.	)
	)
WILLIAM DUNCAN, Warden, California Men's Colony,	)
	)
Respondents.	)

Pursuant to the order of the Court adopting the findings, conclusions and recommendations of the United States Magistrate Judge,

The petition for writ of habeas corpus is dismissed as barred by the statute of limitations of 28 U.S.C. § 2244(d)(1).

DATED: 4-5-99

WILLIAM J. REA
United States District Judge

ENTERED
Clerk, U.S. District Court
April 8, 1999
Central District of California

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA –
WESTERN DIVISION

YAHYA LAVI,	) Civil No.CV 98-8264-WJR(Mc)
	)
Petitioner,	) ORDER ADOPTING REPORT
	) AND RECOMMENDATION
vi.	) OF UNITED STATES
	) MAGISTRATE JUDGE.
WILLIAM	)
DUNCAN, Warden,	)
California Men's	)
Colony,	)
	)
Respondents.	)
	)

Pursuant to 28 U.S.C. § 636(b)(1)(B), the court has reviewed the pleadings and other papers herein, the Report and Recommendation of the United States Magistrate Judge, and the objections thereto, and accepts and adopts the Magistrate Judge's findings, conclusions and recommendations. The court has made a de novo determination of those portions of the report to which objection has been made.

IT IS ORDERED that the Clerk shall serve copies of this Order and the Judgment by United States Mail on the petitioner and the Attorney General for the State of California.

Dated: 4-5-99

WILLIAM J. REA
United States District Judge

FILED
Clerk, U.S. District Court
March 10, 1999
Central District of California

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA –
WESTERN DIVISION

YAHYA LAVI,	) Civil No.CV 98-8264-WJR(Mc)
	)
Petitioner,	) REPORT AND RECOMMENDA-
	) TION OF UNITED STATES
vii.	) MAGISTRATE JUDGE ON A
	) PETITION FOR WRIT OF
WILLIAM	) HABEAS CORPUS BY A
DUNCAN, Warden,	) PERSON IN STATE CUSTODY.
California Men's	)
Colony	)
	)
Respondents.	)
	)

This Report and Recommendation is submitted to the Honorable William J. Rea, United States District Judge, pursuant to the provisions of 28 U.S.C. § 636(b)(1)(B) and General Order 194 of the United States District Court for the Central District of California.

BACKGROUND

The petitioner is a state prisoner in the California Men's Colony at San Luis Obispo, California. Following a jury trial in the Los Angeles County Superior Court, the

petitioner was convicted of two counts of rape of an unconscious victim, three counts of rape by a foreign object of a victim unable to resist, two counts of sexual battery of an institutionalized person and three counts of misdemeanor sexual battery. On June 6, 1994, the trial court sentenced the petitioner to a total term of 13 years in state prison.

On April 17, 1996, the petitioner's conviction was affirmed on appeal to the California Court of Appeal which modified the judgment by removing one day of presentence custody credit. The petitioner filed a petition for review in the California Supreme Court. On July 24, 1996, the California Supreme Court denied the petition for review.

On July 22, 1997, the petitioner filed his first petition for writ of habeas corpus in the California Court of Appeal. On July 24, 1997, the California Court of Appeal denied the petitioner's petition for writ of habeas corpus.

On July 29, 1997, the petitioner filed a second petition for review in the California Supreme Court challenging the denial of his first habeas petition in the California Court of Appeal. On September 8, 1997, the California Supreme Court denied the petitioner's second petition for review on the merits.

On July 22, 1997, the petitioner filed a petition for writ of habeas corpus in this court in Case No. CV 97-5368-WJR (Mc). On September 18, 1997, the petitioner filed his amended petition for writ of habeas corpus in cv 97-5368-WJR (Mc).

On March 6, 1998, the Clerk of the Court entered this court's judgment denying the amended petition without prejudice to the petitioner's right to file a new petition after he has exhausted state remedies.

On June 8, 1998, the petitioner filed a second petition for writ of habeas corpus in the California Court of Appeal. On June 11, 1998, that court denied this second state habeas petition.

On July 10, 1998, the petitioner filed his third petition for review in the California Supreme Court, seeking review of the denial of his second state habeas petition, filed June 8, 1998, in the California Court of Appeal. On August 19, 1998, the California Supreme Court denied that third petition for review.

On October 9, 1998, the petitioner filed his present petition for writ of habeas corpus in this court. This is the petitioner's second habeas petition filed in this court. The petition makes the following claims:

Claim Number One

The trial court violated the petitioner's Sixth Amendment right of confrontation and Fourteenth Amendment right to due process of law when it:

(a) did not permit the petitioner to cross-examine any of his accusers to show demands of $5 million on the accusers' civil suits against the petitioner;

(b) did not permit cross-examination of victim Lazara G. regarding:

(i) the falsity of a prior claim of sexual harassment; and

(ii) a false police report filed by Lazara G.

Claim Number Two

The trial court violated the petitioner's right to due process when it admitted inflammatory and irrelevant evidence concerning the petitioner's character and prior bad acts, resulting in a trial which was fundamentally unfair.

Claim Number Three

The petitioner received ineffective assistance of trial counsel when trial counsel failed to call Hector Rosales as a witness to show that victim Lazara G. had previously filed a false claim of sexual harassment.

Claim Number Four

The petitioner suffered cumulative prejudice as the result of the combined effects of Claim Numbers One, Two and Three, above, rendering the petitioner's trial fundamentally unfair and denying the petitioner his right to due process, guaranteed by the Fourteenth Amendment.

DISCUSSION

Statute of Limitations

The state respondent has now moved to dismiss the petition on the ground that the petition was untimely filed in violation of the one year statute of limitations. The petitioner has filed an opposition to the motion to dismiss.

The pertinent statute of limitations provides as follows:

> (1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of –
>
> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
>
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (D) the date on which the factual predicate of the claim or claims presented could have been

discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

28 U.S.C. § 2244(d).

The primary date used to determine the day from which the one year statute of limitation begins to run is the date the judgment of conviction became final or the expiration of the time for seeking appellate review. 28 U.S.C. § 2244(d)(1)(A). In the present case, the California Supreme Court denied the petitioner's first petition for review on July 24, 1996. The petitioner has not alleged that he sought further direct review on certiorari to the United States Supreme Court. In any event, the time for seeking such review expired 90 days after the California Supreme Court denied the petition for review or on October 22, 1996. Rule 13(1), Rules of the Supreme Court of the United States; 28 U.S.C. §2101(d). The one year statute of limitations ordinarily would begin to run on October 22, 1996 and expire on October 21, 1997.

The one year statute of limitations first came into effect with the passage of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") on April 24, 1996. Previous case law in this circuit has established that no petition filed on or before April 23, 1997, one year after the enactment of the AEDPA, may be dismissed for failure to

comply with the one year time limit. Calderon v. United States District Court (Beeler), 128 F.3d 1283, 1287 (9th Cir. 1997), cert. Denied, 118 S.Ct. 899 and 118 S.Ct. 1389 (1998).

Absent the application of tolling periods, the last date for the filing of the petition in this case was the date which is later when comparing one year after the petitioner's state judgment became final, which was October 21, 1997, to one year after the date of enactment of AEDPA, which was April 23, 1997. In this case, the later date is October 21, 1997.

There is no basis in the present record for seeking to fix the date for beginning the running of the one year statute by any statutory criteria other than that set forth in 28 U.S.C. § 2244(d)(1)(A) according to the discussion set forth above. Thus, there is no evidence in the present record of an impediment to filing a habeas petition created by state action. 28 U.S.C. § 2244(d)(1)(C). The factual predicates for the claims presented in this court were known to the petitioner at least by the time of the filing of his first state habeas petition in the California Court of Appeal on July 22, 1996. Thus, the provisions of 28 U.S.C. § 2244(d)(1)(D) are inapplicable.

The petitioner is entitled to toll the statute of limitations for "[t]he time during which a properly filed application for State post-conviction or other collateral review . . . is pending . . . ." 28 U.S.C. § 2244(d)(2). Thus, the petitioner is entitled to toll the statute during the following periods after October 22, 1996:

(1) the time during which the petitioner's first petition for writ of habeas corpus was

pending in the California Court of Appeal. The petition was filed on July 22, 1997 and dismissed on July 24, 1997. The statute of limitations was tolled for two days; and

(2) the time during which the petitioner's second petition for review was pending in the California Supreme Court. The petition was filed July 29, 1997 and denied September 8, 1997. The statute of limitations was tolled for 41 days.

The petitioner is thus entitled to toll the statute for a total of 43 days (2 days plus 41 days). The statute of limitations thus expired 43 days after October 31, 1997 or on December 3, 1997. Any new petition filed on or after December 4, 1997 is barred by the one year statute of limitations of 28 U.S.C. § 2244(d)(1). The present petition was filed on October 9, 1998 and is barred by the statute of limitations.

No Tolling For Previous Federal Habeas Petitions Dismissed Without Prejudice

The court should not toll the statute of limitations for periods of time in which the petitioner's unexhausted habeas petition in Case No. CV 97-5368-WJR (Mc) was pending in this court. The statute allows the period of limitations to be tolled only for "[t]he time during which a properly filed application for State post-conviction or other collateral review . . . is pending . . . ." 28 U.S.C. § 2244(d)(2) (emphasis added). The drafters of the statute specifically included within the tolling statute the time in which an application for state post-conviction remedies is pending and failed to include the time in which an

application for federal post-conviction remedies is pending. 'That drafting choice appears to be a deliberate congressional determination which this court should honor.

The Ninth Circuit Court of Appeals has not yet decided whether an application for federal post-conviction remedies tolls the one year statute of limitations of 28 U.S.C. § 2244(d)(1). Available case law strongly supports the conclusion that the statute is not tolled in this situation. Babcock v. Duncan, 1997 WL 724450, *2 (N.D. Cal. 1997) (no court has found that the statute is tolled for the period in which a properly filed application for post-conviction or other collateral review is pending in federal court).

As a general proposition, federal law does not provide for the tolling of a statute of limitations during a period of time in which a first action was pending, in circumstances in which the first action is dismissed, without prejudice, (whether voluntarily or involuntarily) and the claims asserted in the initial action are later raised in a second action. Humphreys v. United States, 272 F.2d 411, 412 n.1 (9th Cir. 1959) ("In the absence of statute, a party cannot deduct from the period of the statute of limitations applicable to his case the time consumed by the pendency of an action in which he sought to have the matter adjudicated, but which was dismissed without prejudice as to him. . . ."); Ford v. Sharp, 758 F.2d 1018, 1024 (5th Cir. 1985) (no tolling of statute of limitations for time elapsed during pendency of original suit voluntarily dismissed by plaintiff without prejudice); Willard v. Wood, 164 U.S. 502, 523, 17 S.Ct. 176, 41 L.Ed. 531 (1896) ("[I]f a plaintiff mistakes his remedy, in the absence of any statutory provision saving his rights, or where, from any cause . . . the action . . . is dismissed, and, during the pendency of the action, the limitation runs, the remedy is

barred."); Parker v. Marcott, 975 F.Supp. 1266, 1269 (C.D. Cal. 1997), quoting McClendon v. North American Rockwell Corp., 1970 WL 106, *6 (C.D. Cal. 1970) ("Absent a savings statute which specifically permits a plaintiff to refile an action after a dismissal not on the merits, the law is clear that a dismissal without prejudice leaves the situation the same as if the suit had never been brought.").

The court should not toll the statute of limitations for any time after April 24, 1996 in which the petitioner had a previous habeas petition pending in this court. The statute of limitations in this case expired on December 4, 1997. The present habeas petition was lodged in this court on October 9, 1998. The present petition is barred by the statute of limitations.

In any event, tolling the statute of limitations for the period in which the first federal habeas petition was pending in this court would not assist the petitioner. The petitioner's first federal habeas petition was filed in this court on July 22, 1997 and denied on March 6, 1998. The first petition was pending in this court for 227 days. Assuming arguendo that the statute was tolled during this period, the statute was tolled for 227 days after October 21, 1997 or to June 5, 1998, when it expired. The petitioner filed his present petition on October 9, 1998, well after June 5, 1998.

The petitioner contends in his opposition that the court should consider the petitioner's two separate federal habeas petitions in this court as "a unitary process once federal jurisdiction has been invoked." (Petitioner's Opposition, filed February 8,1999, p. 4.) Under this concept, a second otherwise untimely filed federal habeas

petition, which was filed after the dismissal of a first timely filed federal habeas petition for failure to exhaust state remedies, would be considered to be timely filed, because the second petition is part of the "unitary process" initiated by the first timely filed petition. ; As support for this proposition, the petitioner cites two cases. Stewart v. Martinez-Villareal, 523 U.S. 637, 118 S.Ct. 1618, 1621, 140 L.Ed.2d 849 (1998) held that a prisoner sentenced to death was not barred by the "second or successive habeas corpus application" language of 28 U.S.C. § 2244(b)(2) from reviving a claim that he could not be executed while insane, in circumstances in which the petitioner had initially made the insanity claim in a federal habeas petition but the district court had declined to rule on the claim as premature. In re Turner, 101 F.3d 1323 (9th Cir. 1997) holds that "the second or successive application" language of 28 U.S.C. § 2244(b)(3)(A) does not require a court of appeal to decline to permit the filing of a second petition filed after a district court dismissed an initial petition for failure to exhaust state remedies. Both of the cases cited by the petitioner are interpretations of the "second or successive" application language of various provisions of 28 U.S.C. § 2244(b). Neither of the cited cases may be fairly construed to apply to the statute of limitations of 28 U.S.C. § 2244(d). Thus, the petitioner has not cited any applicable law which supports his "unitary process" theory.

On the present facts and the applicable law, the petition is barred by the statute of limitations.

RECOMMENDATION

For the reasons stated above, the magistrate judge recommends that the court issue an order: (1) approving and adopting this Report and Recommendation; and (2)

dismissing the petition as barred by the statute of limitations of 28 U.S.C. § 2244(d)(1).

Dated: March 10, 1999

JAMES W. McMAHON
United States Magistrate Judge